# In the Supreme Court

**Appeal from the Court of Appeals**
**Fitzgerald, E.T., and Neff, J.T., and White, H.N.**

BETTY SORKOWITZ, Individually and as Trustee for the MORRIS AND SARAH FRIEDMAN IRREVOCABLE TRUST, Betty Sorkowitz, Trustee for the SARAH FRIEDMAN TRUST, Betty Sorkowitz, Personal Representative for the ESTATE OF SARAH FRIEDMAN, BETMAR CHARITABLE FOUNDATION, INC., JULIE SHIFFMAN, JANET JACOBS,
*Plaintiffs-Appellees,*

v. **Docket No. 126562**

LAKRITZ, WISSBRUN & ASSOCIATES, P.C., a Michigan Corporation, GERALD LAKRITZ and KENNETH WISSBRUN, joint and several,
*Defendants-Appellants,*

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## BRIEF ON APPEAL OF DEFENDANTS-APPELLANTS LAKRITZ, WISSBRUN & ASSOCIATES, P.C., GERALD LAKRITZ AND KENNETH WISBURN

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ROBERT H. ROETHER (P19560)
*Attorney for Plaintiffs-Appellees*
27780 NOVI ROAD, SUITE 230
NOVI, MI 48377
(248) 735-0580

NOREEN L. SLANK (P31964)
*Attorney for Defendants-Appellants*
4000 TOWN CENTER, SUITE 909
SOUTHFIELD, MI 48075
(248) 355-4141




ORAL ARGUMENT REQUESTED

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# DEFENDANTS-APPELLANTS LAKRITZ, WISSBRUN & ASSOCIATES, P.C., GERALD LAKRITZ AND KENNETH WISSBRUN'S BRIEF ON APPEAL

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ROBERT H. ROETHER (P19560)
*Attorney for Plaintiffs-Appellees*
27780 Novi Road, Suite 230
Novi, MI 48377
(248) 735-0580

NOREEN L. SLANK (P31964)
*Attorney for Defendants-Appellants*
4000 Town Center, Suite 909
Southfield, MI 48075
(248) 355-4141

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# STATEMENT OF QUESTIONS PRESENTED

## I. The "no extrinsic evidence" issue

> In *Mieras v DeBona*, 452 Mich 278 (1996), this Court permitted beneficiaries to sue their decedent's lawyers but only if beneficiaries show violation of their decedent's intent *without resort to extrinsic evidence.* Plaintiffs cannot meet their prima facie proofs without extrinsic evidence. Is their claim defective as a matter of law?

The trial court answered "Yes" and granted summary disposition in defendants' favor.

The Court of Appeals answered "No."

The plaintiffs contend that the answer is "No."

Defendants Lakritz, Wissbrun & Associates, P.C., Gerald Lakritz, and Kenneth Wissbrun submit that the correct answer is "Yes."

## II. The standing issue:

> *Mieras v DeBona,* 452 Mich 278 (1996), applied to the trust context in *Karam v Kliber*, 253 Mich App 410 (2002), establishes that the only parties who have standing to claim that a decedent's estate planning documents were negligently prepared are the beneficiaries themselves. Can the entity plaintiffs sue?

The trial court restricted the potential plaintiff group to beneficiaries.

The Court of Appeals decided resolution of the standing question should await "further discovery."

How the plaintiffs will answer this question is unclear to defendants.

Defendants Lakritz, Wissbrun & Associates, P.C., Gerald Lakritz, and Kenneth Wissbrun submit that the correct answer is "No."

## STATEMENT OF JURISDICTION AND ORDERS BEING APPEALED

Defendants Lakritz, Wissbrun & Associates, P.C., Gerald Lakritz and Kenneth Wissbrun are appealing, by leave granted, the Michigan Court of Appeals' April 27, 2004 opinion (together with its June 8, 2004 order denying reconsideration) that reversed Oakland County Circuit Court Judge Colleen O'Brien's order granting summary disposition in defendants' favor. See Court of Appeals' Opinion (Apx 54a-60a) and Court of Appeals reconsideration order (Apx 61a). See also trial court Opinion and Order granting summary disposition (Apx 44a-47a) and the trial court order denying reconsideration (Apx 48a-49a). The Court of Appeals decision is published at 261 Mich App 642; 683 NW2d 210 (2004).

This Court has jurisdiction under MCR 7.301(A)(2), appeal by leave granted after decision by the Court of Appeals.

# STATEMENT OF FACTS

This is a case of alleged legal malpractice. Plaintiffs allege that the defendant attorneys, Gerald Lakritz and Kenneth Wissbrun, now practicing with the defendant law firm of Lakritz, Wissbrun & Associates P.C., were retained to provide estate-planning services for Morris and Sarah Friedman "in or prior to 1988."[1] As part of those services, the defendants allegedly prepared various estate planning documents, including the Morris and Sarah Friedman Irrevocable Trust.[2] Morris and Sarah Friedman are now both deceased.

The plaintiffs are:

- The Morris and Sarah Friedman Irrevocable Trust (through its trustee, Betty Sorkowitz)
- The Sarah Friedman Trust (through its trustee, Betty Sorkowitz)
- The Estate of Sarah Friedman (through its personal representative, Betty Sorkowitz)
- Betty Sorkowitz, Sarah Friedman's daughter, a named beneficiary of the will and of the trust[3]
- Betmar Charitable Foundation, a beneficiary of the Sarah Friedman Trust[4]
- Julie Shiffman and Janet Jacobs, granddaughters of Sarah Friedman, named as beneficiaries of the Sarah Friedman Trust.[5]

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[1] First Amended Complaint, ¶ 4, Apx 14a.
[2] Apx 14a¶ 5.
[3] Apx 18a-28a, Plaintiffs' Response Brief Opposing Defendants' Motion for Summary Disposition, p 6 and its accompanying Exhibit A and B, pages of the Sarah Friedman Will and pages of the Sarah Friedman Trust, respectively.
[4] Apx 20a, 21a, Plaintiffs' Response Brief Opposing Defendants' Motion for Summary Disposition.
[5] *Id.*

- Carolyn Jacobs, Renee Jacobs, Jodie Shiffman and Jeffrey Shiffman, great grand children, parties plaintiff contends were "named by status" in the Irrevocable Trust, of Sarah and Morris Friedman, were originally named as plaintiffs but have recently been dismissed, with prejudice.[6]

At the core of plaintiffs' claim is the contention that the Morris and Sarah Friedman irrevocable trust should have included a "Crummey Trust" clause.[7]

A Crummey[8] power is an estate-planning tool that can, under certain circumstances, provide a way to reduce estate taxes. "A Crummey power is a right in a trust beneficiary to withdraw property from the trust when it is contributed" as opposed to the beneficiary not having a present interest in the trust property at the time it is contributed. Douglas H. Evans, *Estate Planning with Life Insurance and Irrevocable Life Insurance Trusts*, PRACTICING LAW INSTITUTE, p 94 (2001). Crummey trusts require a willingness on the part of the grantor to make unrestricted gifts to beneficiaries, by granting trust beneficiaries immediate withdrawal rights over assets the grantor contributed to the trust.[9] Obviously, not all grantors are willing to do so. They may fear losing control of their money or fear what may result when beneficiaries gain immediate access to the money or simply not want to do it.

"[T]he I.R.S. has challenged many trusts which provide Crummey powers to multiple beneficiaries . . . ". Susan F. Bloom, *Making Hay While the Sun Shines: Non-Charitable Estate Planning Techniques*, PRACTICING LAW INSTITUTE, p 48 (2001).

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[6] *Id.* A stipulated order dismissing the great-grandchildren plaintiffs from this appeal was entered by this Court on July 11, 2005.

[7] Apx 14a-15a, First Amended Complaint, ¶¶ 6-11.

[8] *Estate of Crummey v Commissioner*, 397 F2d 82 (CA 9, 1968) (creating the modern view of what are now commonly dubbed Crummey powers).

[9] See e.g. 1 T.M. Cooley J. Prac. & Clinical L, 83, 128 (1997), Brian A. Chard, "A Practical Look at Estate Planning with Family Limited Partnerships."

For reasons as myriad as the differences between people and families, grantors may not want the trust beneficiaries to be given immediate withdrawal rights:

> ...Crummey powers have a number of drawbacks. The most obvious is the fact that the beneficiaries must be given a valid and unrestricted opportunity to withdraw their share of any gifts each year. Even assuming cooperative beneficiaries, the trustee must issue notices to all Crummey beneficiaries each time a gift is made. The trustee must then obtain waivers of withdrawal rights from all beneficiaries, or wait the necessary time period for the rights to lapse automatically.
>
> [Brian A. Chard, *A Practical Look at Estate Planning with Family Limited Partnerships*, 1 COOLEY J PRAC & CLINICAL L 83, 127-128 (1997)].

There is no indication in the estate planning documents that Morris or Sarah Friedman intended to grant Crummey withdrawal rights in their irrevocable trust. In fact, the "four corners" of the document belie any such intent because, instead of permitting immediate withdrawal rights, the trust requires that there be no distribution to any great grandchild from income or principal until that child reaches the age of 18.[10]

Plaintiffs' First Amended Complaint contends that the Friedmans' estate planning attorneys should have, basically, strong-armed the Friedmans into granting Crummey withdrawal rights. If the Friedmans refused to do so the defendants allegedly should have "strongly insist[ed]" in writing and defendants also should have annually intruded into the Friedmans' lives to tell them they had made a mistake in not including a Crummey Trust clause. Plaintiffs say:

> 10. It was the duty imposed on Defendants as attorneys practicing in the estate planning field in 1988 and in subsequent years to:

[10] Apx 30a, Defendants' Reply Brief in Support of Motion for Summary Disposition, p 4, quoting from Section III of the trust: "Until the great grandchild reaches the age of 18, there shall be no distribution to the great grandchild from income or principal."

a. *Strongly insist to Morris and Sarah Friedman, **both verbally** and if met with any resistance, in writing*, the absolute necessity to include a "Crummey Trust" clause in the Morris and Sarah Friedman Irrevocable Trust.

b. Since the failure to include a "Crummey Trust" clause would harm the Friedmans or their ultimate heirs or beneficiaries every separate calendar year, there was a duty imposed on Defendants to renew the advice regarding a "Crummey Trust" clause each year.[11] (Apx, 15a, emphasis added.)

Plaintiffs also claim that the Defendants should have assured that the Estate plan was drafted to avoid depleting the available generation-skipping transfer tax (GST) exemption.[12] Though plaintiffs' complaint is devoid of detail, their contention in responding to the defense summary disposition motion was that, if the Morris and Sarah Friedman Irrevocable Trust had been drafted differently, then the $1,000,000 lifetime exemption from the GST would not have been depleted by gifts by Sarah Friedman to that trust as, apparently, the Internal Revenue Service contended in its July 2, 2001 letter.[13]

The parties agree that the estate planning documents provide no specific evidence that Morris or Sarah Friedman wanted to grant Crummey withdrawal rights or take any other specific measures that might have not utilized a portion of the GST exemption. In other words, there is no improper language that attempted to create a Crummey trust but failed to do so. Instead, to try to ground their claim in the trust documents, plaintiffs rely merely on the fact that the trusts and Sarah Friedman's will make broad statements about a desire to "provide for the secure future" of the beneficiaries. With the aid of extrinsic evidence in the form of the affidavit of an estate planning expert, the plaintiffs basically purport to know what is nowhere stated in the

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[11] Apx 15a, First Amended Complaint, ¶ 10.
[12] Apx 15a, First Amended Complaint, ¶ 10(c), complains of failure to "draft the trust so as to not reduce or deplete the generation-skipping tax exemption of the donors."
[13] Apx 31a-33a, Affidavit of Donald Lansky.

estate plan documents. They say they know Sarah Friedman intended to grant Crummey withdrawal rights.

From boilerplate broad statements about "providing" for a "secure future," plaintiffs' expert extrapolated to supply Sarah Friedman's intention:

> 8. According to the Living Trust, the intention of Sarah Friedman was to "provide for the secure future of her husband and child" and nowhere in the Living Trust does it indicate that it was her intention to benefit the Internal Revenue Service by paying unnecessary or excessive gift, estate or generation skipping taxes.
>
> 9. According to the Irrevocable Trust, the intention of Sarah Friedman was to "provide for the secure future of "his [sic] great-grandchildren and nowhere in the Irrevocable Trust does it indicate that it was her intention to benefit the Internal Revenue Service by paying unnecessary or excessive gift, estate of generation skipping taxes.
>
> 10. According to the Will, the intention of Sarah Friedman was that such document be her "Last Will and Testament" and nowhere in the Will does it indicate that it was her intention to benefit the Internal Revenue Service by paying unnecessary or excessive gift, estate or generation skipping taxes.[14]

In addition, after the Court of Appeals released its decision, ostensibly in support of plaintiffs' answer to defendants' reconsideration motion, the plaintiffs presented the Court of Appeals with *another* piece of extrinsic evidence. Plaintiffs contended that an August 3, 1992 letter from defendant attorney Wissbrun to Martin Sorkowitz somehow also supported maintenance of their cause of action. The letter is *not* of record in this case and clearly may not be considered.[15] In response to defendants' Application for Leave, plaintiffs continued to

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[14] Apx 32a, Lansky Affidavit.

[15] It is *never* proper to bring to the appellate court's attention matters outside the record. When an exhibit "was not part of the trial court record, it is not properly before this court." *Katinsky v Auto Club*, 201 Mich App 167, 171 n1; 505 NW2d 895 (1993). This Court is "limited to the record presented to the trial court." *Amorello v Monsanto Corporation*, 186 Mich App 324, 330; 463 NW2d 487 (1992). Documentary evidence attached to a brief but never filed in the trial

reference this letter, calling it a "hypothetical letter" that might, "if" discovered, be additional extrinsic evidence to support their claims. Whether this letter will be discussed in the calendar case briefing defendants cannot know. But, in the Application answer, plaintiffs quoted the entire text of the letter while maintaining their duplicitous discussion of it as being "hypothetical."[16] The letter, hypothetically or "for real," has absolutely nothing to do with the irrevocable trust instrument fueling plaintiffs' claims of malpractice. None of the persons referred to in the letter as receiving gifts are beneficiaries under the irrevocable trust.

The beneficiary plaintiffs, discontent that more has been or will be paid in taxes than they prefer, now purport to have hindsight-directed prescient vision. They, through their expert, purport to "know" that their decedents intended to handle their vast wealth by disassociating themselves from control of their money in order to maximize tax savings for the benefit of their surviving children and grandchildren. If more is paid in estate taxes than what suits the plaintiffs, then they want the Friedmans' lawyers to pay those taxes as damages on a theory that they are higher than what the Friedmans intended.

Defendants sought summary disposition as their first responsive pleading.

Oakland County Circuit Judge Colleen O'Brien allowed full argument.[17] She held that plaintiffs' case ran completely afoul of a number of directly-applicable legal malpractice case precedents, primarily *Mieras v DeBona*, 452 Mich 278; 550 NW2d 202 (1996) and *Bullis v Downes*, 240 Mich App 462; 612 NW2d 435 (2000). These cases permit beneficiaries to sue the testator's (or settlor's) attorney, but only if their decedent's intent is expressed on the face of the

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court will not be considered. *Nationwide v Quality Builders*, 192 Mich App 643, 648; 482 NW2d 474 (1992).

[16] Defendants' Motion to Strike Plaintiff's Answer on this account was denied in this Court's order granting leave to appeal.

[17] Apx 34a-43a, 4/24/02 transcript.

estate plan documents. The frustration of that intent must be shown without any resort to extrinsic evidence. Judge O'Brien wrote:

> As set forth in *Bullis*, *supra* at 469, "standing is limited to those third-party beneficiaries who can establish that the decedent's intent as expressed in the overall estate plan has been frustrated by the attorney who drew up that plan." The third party beneficiaries have to establish the same without the use of extrinsic evidence. Thus, the intent of the testator is to be found "as expressed on the face of the instrument."[18]

An intent to grant Crummey withdrawal rights is simply not something that can be discerned from the four corners of the estate planning documents. Only resort to extrinsic evidence could supply that supposed intent, as Judge O'Brien explained:

> Here, the intent evidenced by the instrument itself is "to provide for the secure future of the Friedman great-children. [sic]" However, other than by use of extrinsic evidence, namely the affidavit of Donald Lansky, Plaintiffs cannot establish that the intent of the testator was frustrated. In view of the same, summary disposition is appropriate.[19]

Judge O'Brien ruled that only the beneficiaries could potentially fall within the categories of persons who could properly sue the Friedmans' lawyers if this could be done without resort to extrinsic evidence. She accurately reported that plaintiffs conceded the Irrevocable Trust was not a proper party plaintiff: "Plaintiffs agree that the Irrevocable Trust has sustained no loss itself."[20] Judge O'Brien also relied on *Mieras* for its holding that "only the beneficiaries suffer the real loss" and ruled accordingly: "Here, any damages sustained would be that sustained by the named beneficiaries of the Estate and the Trust, not by the Estate or Trust themselves." [21]

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[18] Apx 46a, 5/7/02 Opinion and Order.
[19] Apx 46a-47a.
[20] Apx, 46a.
[21] *Id.*

Plaintiffs sought rehearing, which the trial court denied in its May 29, 2002 order.[22] Plaintiffs timely claimed an appeal to the Court of Appeals.

After oral argument in the Court of Appeals, a majority formed by Judge White (joined by Judge Neff) reversed the grant of summary disposition. A published opinion was released April 24, 2004.[23] Judge Fitzgerald dissented and would have affirmed the trial court result.

As for who had standing to sue, the majority decided not to decide. It ruled a decision must await "further discovery." 261 Mich App at 654. Judge Fitzgerald disagreed. He wrote that only the beneficiaries were properly situated to sue. *Id* at 656.

As for how the non-clients must prove their case, the majority acknowledged that if the *Mieras* "four corners" (no extrinsic evidence) rule applied, then the trial court's grant of summary disposition would have to be affirmed:

> We agree that if the "four corners" limitation enunciated in *Mieras* controlled here, the circuit court's dismissal of the beneficiaries' claims would have been proper. However we do not agree that the "four corners" limitation controls. 261 Mich App at 647 (footnote omitted).

The majority opinion's lengthy footnote 4 explains why application of *Mieras* mandated summary disposition in defendants' favor. The affidavit of the expert, clear extrinsic evidence, was discussed at length—not so much to label it as the extrinsic evidence it clearly is, but to point out the assorted ways it fails to establish settlor intent to include Crummey withdrawal rights. The majority accepted that the "expert's assertion that the absence of a Crummey withdrawal provision in this trust is extraordinary . . . is impermissible extrinsic evidence." *Id* at 647, n4. "If *Mieras* were controlling," defendants were entitled to summary disposition:

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[22] Apx 48a-49a.

[23] 261 Mich App 642; 683 NW2d 210 (2004). There are discrepancies between the unpublished and published opinions, apparently the result of the Court's editors. Throughout this brief, Defendants quote the published version of the case.

> Thus, if *Mieras* were controlling, we would agree with the dissent's conclusion that the circuit court did not err in granting defendant's motion as to the beneficiaries because plaintiffs failed to show that the estate-planning documents did not comport with the decedents' intent as expressed within the four corners of those documents. *Id.*

How the majority determined that *Mieras* did not bind was accomplished via a cramped view of its holding and by ignoring post-*Mieras* Court of Appeals binding precedent, most notably *Karam v Kliber*, 253 Mich App 410; 655 NW2d 614 (2002). The view of the majority was that in *Mieras* the "alternative claims concerning the decedent's intent were both plausible" and that in *Karam* the dispute involved "alternative estate planning approaches." *Id* at 648. The majority view was that the present case lacked plausible or reasonable alternatives and that, despite the *Mieras* "four corners" rule, such considerations mattered. It concluded that Crummey rights were "so standard" that *Mieras* should not apply:

> The claim here does not involve competing contentions of beneficiaries or the choice between alternative estate planning approaches, but, rather, the claim here is that defendants were negligent in their tax planning advice, and failed to include provisions that are so standard in the type of trust here before the Court that the failure to include them demands an explanation. *Id* at 648.

Somehow the majority arrogantly and inaccurately concluded it smelled lawyer malpractice. It decided *Mieras* and *Karam* should not apply or else lawyers would escape accountability:

> The *Mieras* and *Karam* Courts addressed the cases presented; nothing in those opinions indicates that either Court intended to carve out an exemption from actions for malpractice for estate planning/tax attorneys, which is the effect of the circuit court decision. *Id* at 648-649.

While discussing *Mieras*, the majority emphasized that the will there had failed to exercise a power of appointment but that such a failure was not "unusual." *Id* at 649. Of *Karam*, where what was involved was a choice between two types of trusts with resultant different tax

consequences, the majority emphasized that "either approach was acceptable estate planning." *Id* at 650.

The majority decided it was somehow apparent that everyone of means would want Crummey withdrawal rights written into their estate plan, and that this somehow drives the inquiry about the application of the *Mieras* "no extrinsic evidence" rule. Client intent was deemed so discernable that to apply *Mieras* was seen as "ignoring reality:"

> In this day and age, clients go to estate planning experts not only to have valid testamentary documents prepared, but also to have an estate plan that will minimize the taxes payable recommended, and thus have the maximum amount transferred to the donor's intended beneficiaries at the intended times and intervals. We would be ***ignoring reality to dismiss legal malpractice cases such as this*** *one on the basis of the fiction that one cannot know the decedent's intent unless it is apparent within the four corners of the estate planning documents,* and without regard to common sense and expert opinion on estate planning matters. *Id* at 651. (Emphasis added)

The majority rejected the rule of *Mieras* because, judges, lawyers and men and women all supposedly know that everyone wants to exploit all potentially available tax loopholes even at the expense of loss of control of their accumulated wealth:

> We should not ignore as judges what we know as lawyers and as men and women. It is far more likely that the decedents here intended to minimize the taxes payable upon their deaths than that they were indifferent to the amount of taxes payable, and it is virtually certain that they did not intend to pay more taxes than necessary. 261 Mich App at 651.

The majority fully accepted that there can be many valid reasons why people do not want Crummey withdrawal rights written into their Estate plans and they articulated some of the reasons. But despite the no extrinsic evidence rule, the majority required testimony from the living about what the deceased were advised by their lawyers and why the clients decided as they did:

> While there may be valid reasons for the omission of a Crummey clause, this case was dismissed for failure to state a claim, and such reasons were only proffered in the hypothetical. *Id* at 651.

That some clients do not want to risk diminishing personal control of their wealth by conferring present rights of immediate withdrawal to children and grandchildren beneficiaries was a reason the majority said "ignores that such rights can be limited in duration and generally are not exercised precisely because the beneficiary understands that the donor does not wish that they be exercised." *Id* at 652. Reference to the cost and burden of sending notices was declared "fanciful when the largely administrative burden of mailing these form notices is compared to the amount of taxes that might have been saved." *Id.*

The majority decided that the "no extrinsic evidence" rule this Court articulated in *Mieras*, and which other panels of the Court of Appeals have dutifully applied since, is a bad rule for claims that implicate estate planning tax advice:

> If safeguards are necessary because of the nature of this [estate planning] specialty, such safeguards can be developed. But applying the *Mieras* "four corners" limitation to such claims is not required by precedent, goes too far in the direction of protecting the attorney, and is against the best interests of the client and, ultimately, the profession. *Id* at 653.

Judge Fitzgerald, writing in dissent, presented a succinct analysis of the facts and the governing law, relying on the series of Michigan cases that have applied the "no extrinsic evidence" rule in a variety of context: *Mieras, supra; Karam, supra; Bullis, supra;* and *Ginther* v *Zimmerman*, 195 Mich App 647, 655; 491 NW2d 282 (1992):

> Because plaintiffs failed to show that the estate-planning documents did not comport with the decedents' intent as expressed within those documents, the trial court did not err in granting defendants' motion as to the various beneficiaries. 261 Mich App at 656.

As was true of the majority opinion, Judge Fitzgerald explained how the Estate planning documents failed to prove that the deceased client's intent was frustrated:

> Rather than provide the estate-planning documents and demonstrate some conflict or inconsistency among them or some ambiguity within them, plaintiffs provided excerpts that shed no light on the issue and an affidavit from an expert who purported to interpret the documents. *Id* at 656.

Judge Fitzgerald emphasized that experts have no proper place interpreting pure questions of law:

> The interpretation of the estate-planning documents is a question of law for the court to decide. *In re Bem Estate*, 247 Mich App 427, 433; 637 NW2d 506 (2001); *Karam, supra*, and an expert cannot testify regarding questions of law or legal conclusions. *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 122-123; 559 NW2d 54 (1996). *Id* at 656.

In contrast to the majority, Judge Fitzgerald respected this Court's clear holding in *Mieras* that the personal representative of the client's estate is not a proper party plaintiff:

> Although the decedent's cause of action for legal malpractice survived her death, MCL 600.2921, and may be pursued by the personal representative of her estate, *Mieras, supra* at 297, the only loss suffered by the decedent was, at most, deficient legal advice for which she could recover the attorney fee paid. The only significant injury, and the one for which plaintiffs seek recovery, was some untoward tax consequences that affected how much money the beneficiaries ultimately received from the decedent's estate. Because neither the decedent nor the estate suffered the loss, the personal representative cannot pursue a cause of action to recover it. *Id* at 656.

Judge Fitzgerald would have affirmed the trial court grant of summary disposition in the defendants' favor.

Defendants timely filed a Motion for Reconsideration, challenging the majority's failure to follow the clearly governing precedent of *Mieras* and *Karam*. Reconsideration was denied, in an order dated June 8, 2004. Judge Fitzgerald dissented.

Defendants' Application for Leave to Appeal was timely filed. This Court granted leave in its May 12, 2005 order. See 472 Mich 898 (2005).

## STATEMENT OF STANDARD OF REVIEW

This appeal raises only matters of law that were addressed in the trial court in the context of summary disposition. This Court's review is *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999) and *Smith v Globe Life*, 460 Mich 446, 455; 597 NW2d 28 (1999). *De novo* review in summary disposition appeals arising out of suits against lawyers by the beneficiaries of a trust is specifically accepted as the proper appellate standard of review in *Bullis v Downes*, 240 Mich App 462, 467; 612 NW2d 435 (2000) and in *Karam v Kliber*, 253 Mich App 410, 419; 655 NW2d 614 (2002).

## SUMMARY OF ARGUMENTS

*Mieras* v *DeBona*, 452 Mich 278; 550 NW2d 202 (1996) permits beneficiaries to sue their decedent's estate planning lawyer, but only if they can prove their decedent's intent was frustrated without resort to any extrinsic evidence. The rule has been applied to the full gamut of potentially-challengeable estate planning documents, see *Bullis v Downes*, 240 Mich App 462; 612 NW2d 435 (2000) (trust and deeds) and *Karam v Kliber*, 235 Mich App 410; 655 NW2d 614 (2002) (inter-related trusts). The "four corners" rule should not have been jettisoned here.

The Court of Appeals' majority agreed that "if" this Court's opinion in *Mieras* v *DeBona*, 452 Mich 278; 550 NW2d 202 (1996) were controlling, defendants were entitled to the summary disposition that the trial court granted. The majority created an exception to *Mieras* "where the dispute is not between beneficiaries, or between alterative reasonable approaches to estate tax planning, but between the use of tax savings language and the payment of taxes asserted to have been unnecessary." *Sorkowitz v Lakritz Wissbrun*, 261 Mich App 642, 651; 683 NW2d 210 (2004).

Defendants submit that *Mieras* is well-reasoned and that the exception carved out by the Court of Appeals majority is: (1) inconsistent with *Mieras*, (2) inconsistent with probate law more generally, which does not look to extrinsic evidence to supply testator intent, and (3) inconsistent with a sound public policy that must assure that estate planning clients are well-served by their attorneys. When beneficiaries are disgruntled because tax avoidance was allegedly not pursued in a way they favor, that cause of action can only be pursued if the estate planning documents show that the grantor's intent was frustrated. To abandon *Mieras* whenever beneficiaries are dissatisfied by the taxes that must be paid, creates a situation where a lawyer's duty to estate planning clients will be diluted. It does not serve estate planning clients to create a

situation where their interests will compete with the interests of their beneficiaries. *Mieras* allowed beneficiary non-clients to sue their decedent's lawyer. This exception to the general rule, that only clients can sue a lawyer, works precisely and only because it is tempered by the "four corners" rule.

*Mieras* clearly allows only the beneficiaries to sue. The Estate and the Trust are not proper party plaintiffs because they have suffered no injury.

## ARGUMENT I

**In *Mieras*, this Court permitted beneficiaries to sue lawyers who drafted a will but only if beneficiaries could show their testator's intent was frustrated *without resort to extrinsic evidence.* The plaintiffs have no potentially viable claim because, without extrinsic evidence, they cannot prove their decedents intended to grant the beneficiaries Crummey withdrawal rights.**

### *a. The Mieras "four corners" rule: What it is, why it is a good rule, and how the majority opinion violates it.*

In *Mieras v DeBona*, 452 Mich 278; 550 NW2d 202 (1996), this Court held that "beneficiaries named in a will may bring a tort-based cause of action against the attorney who drafted the will for negligent breach of the standard of care owed to the beneficiary by nature of the beneficiary's third-party beneficiary status." *Mieras* at 308 (J. Boyle). All members of the Court accepted that new rule of law that allowed a non-client to sue. Justice Levin wrote the lead opinion. Justice Boyle's opinion, which the remaining five Justices of this Court signed, accepted certain sections of Justice Levin's opinion but rejected others. The majority decried Justice Levin's "use of extrinsic evidence" in parts VI and VII of his opinion, even while he was purporting to reject such use. It also rejected his analysis that resort to extrinsic evidence might somehow turn on whether the allegedly omitted language was common or uncommon.

The *Mieras* Court understood that imposing such a duty running to the beneficiaries was counter to the general rule that "an attorney will be held liable for...negligence only to his client..." *id* quoting *Atlanta Ins v Bell*, 438 Mich 512, 518; 475 NW2d 294 (1991). The *Mieras* majority emphasized that this newly-recognized duty owed to the beneficiaries must be "narrowly circumscribed." *Id* at 302. Only imposition of severe restrictions on the duty owed will sufficiently hold in check what is the greatest fear of the courts regarding this category of legal malpractice cases: namely, that a lawyer's duty of loyalty to a client will be threatened because of the cadres of

beneficiaries whose financial interests lie elsewhere than where the client intended to let them lie. As one legal scholar has explained the conflict-creating potential:

> Such a cause of action engenders potential for dividing the attorney's loyalties between the client and the beneficiaries. Indeed, because the attorney's possible malpractice liability to the client is dwarfed by the possible liability to the beneficiaries, the recognition of a cause of action encourages the attorney to emphasize the beneficiary's interests to the detriment of the client's interests.
>
> [Bradley E.S. Fogel, *Attorney v. Client—Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN L REV 261, 311 (2001)].

This Court had ample reason to be justly and resolutely circumspect in extending this cause of action to beneficiaries. "The duty owed to named beneficiaries" "only requires the attorney to draft a will that properly effectuates the distribution scheme set forth by the testator in the will." *Mieras, supra* at 302. This Court took what the panel in *Bullis v Downes* 240 Mich App 462, 469; 612 NW2d 435 (2000) described as "great pains" to assure that Johnny-come-lately beneficiaries will not be able to disturb the testator's intent.

Most significantly, "extrinsic evidence" cannot be used to "prove that the testator's intent is other than that set forth in the will." *Mieras* at 303. It is on this issue that all the remaining Justices found Justice Levin's lead opinion lacking. Justice Boyle pointed out that Justice Levin had acknowledged "the evils of allowing disgruntled beneficiaries to prove by evidence wholly extrinsic to the will that the intent of the testator was other than that set forth in the will." But she criticized his opinion because she saw that some of the cases Justice Levin relied on "allowed just that." *Id* at 302. The remainder of the bench, along with Justice Boyle, would not accept anything other than strict adherence to the rule that the testator's intent being advanced by the beneficiary plaintiffs must be grounded only in the four corners of the will. Reliance on extrinsic evidence is not permitted.

In a portion of Justice Levin's opinion that was rejected by the majority, he wrote that "it was not unusual" for a will (as in *Mieras*) "to fail to exercise a power of appointment." *Mieras* at 296. The majority opinion in the present case exactly repeated that portion of *Mieras*, 261 Mich App at 649 ("It is not unusual for a will to fail to exercise a power of appointment."). Echoing the same theme and applying it to the present case, the majority emphasized that: "The use of Crummey clauses has become *standard* in irrevocable trusts...". *Id* at 646 (emphasis added).

The idea that application of the "four corners" rule turns on how standard (or non-standard) it is to include a particular clause in an estate planning document was completely rejected in *Mieras*. Justice Boyle, and the five Justices who joined her, rejected Justice Levin's reasoning that extrinsic evidence should be disallowed because it was not "unusual" to fail to include a power of appointment in a will. But that was exactly the erroneous analysis the majority in the Court of Appeals engaged in when it refused to apply the "four corners" rule because including Crummey rights has supposedly "become standard." The *Mieras* majority soundly rejects all such analyses:

> The author of the lead opinion (Justice Levin) concludes that it is common not to include a power of appointment in a will; therefore, it was not error to do so in this case. *Under the lead opinion, each separate paragraph of a will would have to be examined to determine whether it is common to include or exclude that provision from the will;* ***the possibilities are endless***. *Mieras* at 303 (emphasis added).

Justice Boyle insightfully predicted the pitfalls of permitting the use of extrinsic evidence. If the "four corners" rule is applied only where commonly-omitted or commonly-included, then the rule is...no "rule" at all. The search for the client's intent must be restricted to

the estate planning documents. The search cannot look outward to speculate about what is "common," "unusual," "standard" or "extraordinary."

Rejecting such a search is so central to the *Mieras* analysis that this Supreme Court returned to pounding the nail in that coffin at the close of the opinion:

> The lead opinion's willingness to deviate from the explicit limitation of extrinsic evidence it initially cite is also demonstrated by *unnecessary speculation* regarding whether powers of appointment are ***customarily included*** in a professionally drafted will. * * * We conclude, however, that *such speculation is neither proper nor necessary*. *Id* at 308 (emphasis added).

That "such speculation" about what is customarily included "is neither proper nor necessary" was the last thing that this Court wrote in the portion of the *Mieras* opinion on the "four corners" rule. The majority opinion in the present case could not be more wrong that the supposedly "customary" inclusion of Crummey rights should excuse plaintiffs' resort to extrinsic evidence.

The majority opinion in this case thumbs its nose at *Mieras*. In the process, it does a grave disservice to the clients and their estate planning attorneys. Unless it is reversed, lawyers will be placed in the untenable position of being required to advocate aggressive tax avoidance even though the interests of the client and the beneficiaries may diverge.

The Court of Appeals' majority opinion swiftly set the probate and estate planning attorneys in the state puzzling over how to competently and confidentially advise clients in tax matters now that the beneficiaries' competing tax avoidance interests have invaded their offices. For those well-versed in this area of law, the portion of the opinion where Judge White quotes from §2269 Federal Estate and Gift Taxes Explained (32d ed) is especially puzzling. Although that portion of the quote is captioned "Crummey Trusts" the text of quote is actually a discussion of *a particular type* of Crummey power that the IRS has vigorously resisted for years. The quote is actually discussing a power derived from the tax court case of *The Estate of Maria Cristofani,*

*Deceased, Frank Cristofani, Executor v Commissioner,* 97 T.C. 74 (1991). That is why the quote is talking about grandchildren whose only interest were "contingent remainder interests," because a Cristofani Crummey power is a type of Crummey power where, other than the withdrawal right, the power holder's only other interest is that of a contingent remainder.

The Internal Revenue Service has always viewed Crummey powers very skeptically, though the majority wrote that the IRS has "acquiesced in the use of Crummey clauses to transform a future interest, which would be subject to the unified tax, into a present excludable interest." 256 Mich at 646. But *Cristofani* Crummeys, which the majority in the Court of Appeals saw fit to (even if inadvertently) describe in the opinion, are entirely another matter. The panel wrote that use of Crummey clauses "has become standard in irrevocable trusts," *id*, but it did so partly by writing about *Cristofani* Crummeys which are anything *but* standard. Of *that* type of Crummey, the IRS Chief Counsel says:

> The Service will deny exclusions for powers held by individuals who either have no property interests in the trust except for Crummey powers, or hold only contingent remainder interests. To extend the gift tax benefit of Crummey powers to beneficiaries with interests more remote than current income or vested remainders would undermine significantly the unified system of estate and gift taxation which Congress intended, and would invite flagrant abuse in the future.

*Action of Decision 1992-009* (Addendum, ***Tab A***).

If this Court of Appeals' opinion is upheld, tax and estate planning attorneys will be concerned that Cristofani Crummey powers and other aggressive tax avoidance devices will need to be included in estate plans. For example, a Qualified Personal Residence Trust (QPRT) permits parents to gift their residence to their children at a fraction of the transfer tax cost that would have been incurred on a typical gift or estate transfer. The tax device involves the transfer of the parents' home to a trust. While the parents retain the right to live in the home for a term of

years, when the term expires the house will pass to the children. If the parents survive the term of years substantial transfer tax savings will occur. For how QPRTs have been treated in the popular press, see e.g. "For the Wealthy, Death is More Certain Than Taxes," N.Y. Times, Dec 22, 1996, §1, Page 1, Column 1.[24] This article discusses a QPRT where parents transferred their residence to three children *under the age of eleven.*

There is no shortage of aggressive tax avoidance estate planning techniques. Many of them will be distasteful to a lawyer's client but beneficiaries are bound to find them very attractive. Unless the ability of beneficiaries to sue their decedent's lawyers are reined in by the four corners of the estate planning documents, when their lawsuits fill the courts the beneficiaries' presence will inevitably invade the privacy of estate planning sessions.

Use of limited partnerships in estate planning is another example of tax avoidance that beneficiaries find intoxicating but their wealthy elders will often find frightening, and quite properly so, because it divests control. In determining the value of a limited partnership interest or LLC interest, one is entitled to minority interest and lack of marketability discounts. Some legal commentators suggest that discounts of limited partnership or LLC interests are in the range of 30% to 40% from the liquidation value of the entity.[25] One prominent authority on family limited partnerships and limited liability companies concludes that: "In situations where a taxpayer does not have unilateral liquidation control of a family limited partnership, depending on the partnership's distributable cash flow, courts have found that the taxpayer's interest in the

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[24] Currently available on the internet at http://home.gwu.edu/~ngcohen/wealthy.htm.

[25] See *Dennis Belcher, Phillip E. Heckerling, 30th Annual Institute on Estate Planning, Chapter 10, University of Miami (1996.)*

partnership may have a value as much as 40% to 85% lower than if a hypothetical willing buyer had liquidation control."[26]

Family limited partnership agreements or limited liability company operating agreements may permit significant valuation discounts for gift tax purposes. The value of the limited partnership interest is determined by the donee rather than the donor. If the donee of the limited partnership interest (for example, a child) does not have the power to liquidate the partnership and receive his or her pro rata share of the partnership interests, then the underlying asset value of the partnership interest should be greater than the actual limited partnership interest transferred. By selecting a partnership or limited liability company entity for succession planning the result is a locked-in discount. A locked-in discount results from restrictive provisions contained in the LLC or partnership agreement that affect the sale or transfer of the interest. The result of all this is that donors can gift limited partnership assets but they will be valued much lower than their worth for gift tax purposes.[27]

If what estate planning is all "about" is counseling clients to serve their beneficiaries well in terms of tax avoidance efforts that are not discernibly the decedent's intent as established by the estate planning documents, why stop with Crummeys, and Cristofani Crummeys, and QPRTs and use of family LLCs? One aggressive estate planning technique combines the benefits of valuation adjustment (e.g. a family limited liability company) with Crummey powers. Use of a

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[26] *See Stacy Eastland, 33rd Annual Phillip E. Heckerling, Institute on Estate Planning, University of Miami, 1999 Fundamental Programs Materials pp 1-27 and John W. Porter, 35th Annual Phillip E. Heckerling Institute on Estate Planning, "Defending the Family Limited Partnership"* I-A-63.

[27] Assuming a combined lack of marketability, minority interest discount and locked-in discount of 35%, the donor will be able to gift $15,385 of limited partnership assets and have it valued for gift tax purposes at $10,000. The calculation is:

| | | |
|---|---|---|
| Annual Exclusion | | 10,000 |
| Applicable Discount | = | (1 - .35) = $15,385 |

Crummey grants the beneficiary a withdrawal right over the gifted property without a vested present interest. Crummey power holders who are contingent remaindermen will only receive the benefit of the trust property if a trust beneficiary fails to survive the term of the trust.[28] With that, full circle back to the Court of Appeals' opinion. Its notion of Crummey clauses having become so "standard" in irrevocable trusts that courts could somehow, as judges, lawyers and men and women, 256 Mich App at 651, discern a grantor's intent is debunked.

The point of these examples is not to make tax lawyers of us all. The point is to see that it does not take an extravagant imagination to see that providing beneficiaries with a cause of action against their decedent's lawyer, as *Mieras* does, will burden the lawyer-client relationship with duties to the beneficiaries that conflict with client interests *unless the cause of action is single-minded tied to the four corners of the estate planning document*. That is the only place where testator intent can be looked for or found.

A client's interests will not be confidently and single-mindedly represented unless this Court reverses the Court of Appeals. Until then, lawyers will be focused on the rights of beneficiaries of wills and trusts and not exclusively on their clients. If the present published case stands, Justice Levin's dissent will rule in Michigan instead of the *Mieras* majority opinion. Beneficiaries will be able to attack the lawyer's competencies by reviewing each paragraph of a will or trust to determine if some additional more-aggressive tax device should have been included in the estate plan. Justice Boyle's vision of the "endless possibilities" for disgruntled beneficiaries scrutinizing every component of estate documents to find release from the "four corners rule" because something uncommon allegedly emerges will be fulfilled.

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[28] If, in 1999, a lawyer's client had four children and twelve grandchildren, the client could make tax free gifts of $246,160 per year for the benefit of their children by combining Crummey

### *b. Well-reasoned out-of-state cases, informed by sound public policy that focuses on and protects client rights, support adherence to the "four corners" rule.*

Justice Boyle echoed Justice Levin's reliance on *DeMaris v Asti*, 426 So2d 1153, 1154 (Fla App 1983) for its statement that: "There is no authority—the reasons being obvious—for the proposition that a disappointed beneficiary may prove, by evidence totally extrinsic to the will, the testator's testamentary intent was other than as expressed in his solemn and properly executed will." *Mieras* at 303 reflecting back on *Mieras* at 292. However, Justice Boyle and the remaining Justices, found that enforcement of the "no extrinsic evidence" rule was distressingly lax: "Only a few of the cases cited," by Justice Levin were viewed as properly illustrating or honoring this limitation. *Id* at 303.

The following "few cases," honoring the rule, were offered as a guide: *Lucas v Hamm*, 56 Cal 2d 583, 588; 15 Cal Rptr 821 (1961); *Guy v Liederbach*, 459 A2d 744 (Pa, 1983), *Espinosa v Sparber*, 612 So 2d 1378 (Fla, 1993) and *DeMaris*, *supra*. This Court explained that these cases teach how the "four corners" rule is supposed to work and why. *Id* at 303-305.

The *Mieras* Court wrote, of *Guy* and *Lucas*, precisely what cannot be said of the present case:

> In both cases, the defect was clearly evident by examining only the will. Extrinsic evidence was not necessary to establish that the intent of the testator had been thwarted by attorney error. Thus, in both case, the courts concluded that the beneficiaries had established a valid cause of action... *Mieras* at 304.

*Espinosa* is a case where the extrinsic evidence showed that the testator instructed his attorney to draft a second will that would include a child born after execution of the first will. That

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powers with family limited liability companies, instead of $40,000 of tax free gifts per year to the children.

did not happen and, instead, a new codicil was executed with respect to the first will. The after-born child was omitted. Summary disposition in favor of the attorney was affirmed. The *Mieras* majority explained why the line must be drawn in the sand, precluding extrinsic evidence, even on facts as sympathetic as those in *Espinosa*:

> If extrinsic evidence is admitted to explain testamentary intent,...the risk of misinterpreting the testator's intent increases dramatically. Furthermore, admitting extrinsic evidence heightens the tendency to manufacture false evidence that cannot be rebutted due to the unavailability of the testator. For these reasons, we adhere to the rule that standing in legal malpractice actions is limited to those who can show that the testator's intent, *as expressed in the will*, is frustrated by the negligence of the testator's attorney. [Emphasis in original] *Mieras* at 305 quoting *Espinosa* at 1380.

In an opinion that was unusually attentive to the needs of the bench and bar to understand the practical workings of the rule, the *Mieras* majority next examined certain cases that paid lip-service to the "four corners" rule but applied it improperly. *Heyer v Flaig*, 70 Cal 2d 223, 229, 74 Cal Rptr 225 (1969) was declared wrong-headed as to its application of the "no extrinsic evidence" rule. In *Heyer*, the attorney drafted a will for a testator who was soon to be married. It directed that her estate be shared equally among her daughters and did not mention the new husband. The husband later claimed a part of the estate as a post-testamentary spouse and the daughters sued the attorney. The *Mieras* court informs that the California Supreme Court relied on extrinsic evidence "to conclude that the attorney knew" of the upcoming marriage but "failed to advise" his client that she "should change her will after her marriage." *Mieras* at 305-306. The *Heyer* court's use of extrinsic evidence was explained as being inconsistent with Michigan's "four corners" rule.

As another example of an approach that would not square with the *Mieras* rule, Justice Boyle offered *Arnold v Carmichael*, 524 So2d 464 (Fla App, 1988). An attorney modified a will to include two new provisions, as directed by his clients, but the new will did not contain the residuary

clause that was present in the first will. To give the disappointed beneficiaries some wiggle room, the *Arnold* court interpreted the "no extrinsic evidence" rule merely to mean that "a disappointed beneficiary could not introduce extrinsic evidence of testamentary intent that would conflict with the will." *Mieras* at 306, paraphrasing *Arnold* at 467. Such a limp rule will not do for Michigan:

> The testator's intent as expressed in the will was ignored and evidence, not of what the testator intended but of what provisions are typical in most wills, was admissible to establish a cause of action. The scope of liability would be boundless under this formulation... *Mieras* at 307.

Of some interest, the evidence in *Arnold* that was rejected by the *Mieras* court was the affidavit of the testator's attorney's (now a defendant). It was submitted by a successor attorney to support use of a residuary clause from the client's prior will. The defendant's affidavit admitted that he inadvertently omitted the residuary clause from the redrafted will. One can rightly conclude that a "no extrinsic evidence" rule that bars even the defendant attorney's *own* affidavit is a rule not to be trifled with.

Despite the painstaking exposition of the "four corners" rule in *Mieras*, as well as the subsequent development of the rule by the Court of Appeals, the majority in this case welcomed extrinsic evidence:

> *Defendants should be required* ***to testify*** *under oath and* ***explain*** either that the Crummey clause was not discussed because they did not think the standard of care required such a discussion, or that the clause was discussed, but was declined, and for what reason. Possibly the decedents gave other annual gifts to the beneficiaries, or there were other trusts, e.g. insurance trusts, naming the same beneficiaries that already contained a Crummey provision, or there were some other considerations such as generation-skipping tax concerns that explain the decision not to include a Crummey withdrawal provision. The case should not, however, be dismissed on the pleadings. 261 Mich App at 652-653 (emphasis added)

Unless this Court reverses the Court of Appeals, the new day that dawned with release of this published opinion will see the exceptions eclipsing the "no extrinsic evidence" rule. Unless this

Court reverses the Court of Appeals and affirms the trial court's grant of summary disposition, the rule will be relegated to a scrap of paper so tiny that just about every claim will be allowed to spill off the face of the estate planning documents.

The majority opinion in this case was actually influenced more by speculation than by extrinsic evidence. Attorney Lansky's affidavit was as unpersuasive to the majority as it was to dissenting Judge Fitzgerald. It bears emphasis, though the majority in the Court of Appeals chose to ignore it, that the notion of Sarah Friedman's intending to grant Crummey rights actually *conflicts* with the clear language of the Irrevocable Trust. The Trust contains a provision in Section III that states "Until the great grandchild reaches the age of 18, there shall be no distribution to the great grandchild from income or principal." That provision is completely *inconsistent* with an intent to grant Crummey withdrawal rights. A Crummey provision allows transfers by a grantor to a trust to qualify for the annual gift tax exclusion, *but only if* the beneficiaries have a right to obtain the gift upon demand. Sarah Friedman wanted her great grandchildren to only be able to withdraw property from the trust when they turned 18 (and presumably would be college-bound) and not before.

The dissent got it right. The majority could not know, somehow, what the Friedmans wanted from their estate planning. It is a risky and arrogant business to presume that decedents, in their lifetime, valued future tax benefits more that maintaining control of their money and favored future tax benefits even if it meant allowing beneficiaries immediate access to their money.

The spectacle of these beneficiaries offering up extrinsic evidence about what their mother and grandmother and maybe even their father and grandfather intended is also not the wise public policy proposition the majority envisioned. The *Mieras* and *Karam* "four corners"

rule is not "about" immunizing lawyers. It is "about" protecting testators and settlors once they have died and cannot speak for themselves when bereaved non-clients are tempted to look for easy pickings.

The majority believed it knew the decedents' intent already, even without any evidence of it: "It is virtually certain that [the Friedmans] did not intend to pay more taxes than necessary." 256 Mich App at 651. If testator/settler intent is so easily discernible as the majority supposed, one would also have supposed that the plaintiffs would have come forward in the trial court with something other than the absolutely lame affidavit of an expert who purported to discern an intent to grant Crummey powers based on nothing more than boilerplate about how Sarah Friedman wanted to provide a secure future for her beneficiaries. How exactly is a secure *future* provided by giving access to money now? The Friedmans were self-made people of another era. The idea that the majority knows from their training as judges and lawyers, or from their experience as human beings, whether clients wanted to lose a measure of control over wealth during their lifetime to create tax benefits for their survivors, is to consult a Ouija board and not anything that should speak with authority in an appellate court.

### *c. The Mieras "four corners" rule is an appropriate fit with Michigan probate law more generally, which applies the rule to safeguard testator intent, and is also consistent with basic contract law.*

As recognized in *Espinosa,* the Florida case that so influenced this Court in *Mieras*, the rule disallowing extrinsic evidence in legal malpractice cases arising out of estate planning attorney-client relationships is grounded in courts' traditional reluctance to use parole evidence in will construction cases:

> . . . [T]he will was designed as a legal document that affords people a clear opportunity to express the way in which they desire

> to have their property distributed upon death. To the greatest extent possible, *courts and personal representatives are obligated to honor the testator's intent in conformity with the contents of their will.* 612 So2d at 1380 (emphasis added).

Michigan is committed to restricting itself to gleaning testator intent only from the words of the estate planning documents, so long as those words (as here) are not ambiguous. Courts are intolerant of efforts to sift the words through the filter of extrinsic evidence because of the risk that the testator's true intent will be dishonored:

> A fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible. As with other legal documents, the "intent" is to be gleaned from the will itself unless an ambiguity is present. *The law is loath to supplement the language of such documents with extrinsic information.* This is especially so in the case of testamentary documents because the maker is not able to provide additional facts or insights. *In re Estate of Kremlick*, 417 Mich 237; 331 NW2d 228 (1983)

The "primary duty" of any court faced with the task of resolving a disputed testamentary disposition is to effectuate the intent of the testator. *In re Estate of Butterfield*, 405 Mich 702, 711; 27 NW2d 262 (1979). "Where there is no ambiguity, that intention is to be gleaned from the four corners of the instrument, and the court has merely to interpret and enforce the language employed. *Id.*

Absent patent or latent ambiguity, "the intention to be ascribed to the testator is that intention demonstrated in the will's plain language." *In re Dodge Trust*, 121 Mich App 527, 542; 330 NW2d 72 (1982) quoting *In re Willey Estate*, 9 Mich App 245, 249; 156 NW2d 631 (1967). These same rules apply with equal force to the interpretation of trust documents. *In re Maloney Trust*, 423 Mich 632, 639; 377 NW2d 791 (1985) (quoting *Kremlick* approvingly on this point). "A court may not construe a clear and ambiguous will in such a way as to rewrite it." *Paine v Kaufman*, __ Mich App __; ___ NW2d ___ (2005) 2005 Mich App LEXIS 1271.

The rule of construing an unambiguous document according to its terms without reliance on extrinsic evidence is not novel or in any way limited to probate law. In the context of contract law, it is well established that where a contract is unambiguous, "the plain meaning of the terms cannot be impeached with extrinsic evidence." *Zurich Ins Co v CCR and Co (On Reh)*, 226 Mich App 599, 604; 576 NW2d 392 (1997).

> It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties and then carry out that intention regardless of whether the instrument contains language sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument.
>
> . . . We must look for the intent of the parties in the words used in the instrument. [*Id.* at 603-604, quoting *Michigan Chandelier Co v Morse*, 297 Mich 41, 49; 297 NW 64 (1941).]

Furthermore, "[i]t is beyond doubt that the actual mental processes of the contracting parties are wholly irrelevant to the construction of contractual terms. Rather, the law presumes that the parties understand the import of a written contract and had the intention manifested by its terms." *Id.* at 604, citing *Birchcrest Bldg Co v Plaskove*, 369 Mich 631, 637; 120 NW2d 819 (1963).

The policy consideration for interpreting wills and trusts without the use of extrinsic evidence is identical to those favoring an identical method for the interpretation of contracts: effect should be given to the intent of the parties at the time the documents are executed, without the danger that someone might come forward later, with the benefit of hindsight, and thwart the intended results. Indeed, this consideration is even more crucial in the context of trusts and wills, because the party whose intent is at issue is not available to testify about it.

The majority even came perilously close to allowing testator intent, absent from the four corners of the estate planning documents, to be supplied by a so-called expert. That would have been clear error, as Judge Fitzgerald pointed out in dissent. 256 Mich App at 656. It is "the

exclusive province of the court to rule on matters of law." *Reinhart v Winiemko*, 444 Mich 579, 607; 513 NW2d 773 (1994) [J. Riley, joined by J. Griffin and J. Mallett], with the other justices comprising the majority in agreement, *id* at 608. This is true in legal malpractice cases, see *Winiemko.* It is true in probate law, see *In re Bem Estate*, 247 Mich App 427, 433; 637 NW2d 506 (2001) (the probate court is to "determine the legal effect of the words used" and this is not a finding that is "factual in nature").

The *Mieras* evidentiary rule, which applies when non-client beneficiaries sue lawyers for alleged failures to properly serve a deceased client, grows from the respect that our courts have for testator/settlor intent and from the justifiable fear that second-guessing that intent by resort to extrinsic evidence is unwise public policy.

***d. Other states continue to abide by the "four corners" rule, recognizing it as a sound public policy that protects clients' rights.***

In addition to *Demaris, supra* and *Espinosa, supra*, Florida courts have adhered to the "four corners" rule in legal malpractice cases arising out of estate planning in *Stept v Pavoli*, 701 So2d 1228 (Fla App 1997) (Dismissal affirmed where beneficiaries claimed lawyer error caused over $100,000 in estate taxes since the trust "did not contain the expressed intent...to avoid or minimize taxes"), *Kinney v Shinholser*, 663 So 2d 643 (Fla 1995) (the lawyers failed to minimize estate taxes); *Lorraine v Grover, Ciment, Weinstein & Stauber,* 467 So 2d 315 (Fla 1985) (negligent failure to advise of a prohibitions affecting homestead property and of possible alternatives). To permit plaintiffs to prove testamentary intent by extrinsic evidence would "open the door to the fabled triplets of conjecture, speculation and surmise." *Lorraine* at 318. Even when a will contains a direction that "just taxes be paid," this is not evidence intrinsic to the will that a specific plan was intended as to estate taxes. *Kinney* at 645-646.

In *Babcock v Malone*, 760 So2d 1056 (Fla, 2000) the "four corners" rule was applied. The beneficiaries' extrinsic evidence included the attorney's letter to their decedent enclosing the unexecuted draft of a new will and a bill for services rendered. The Court adhered to *Espinosa*, *supra*, including for its proposition that "standing in legal malpractice actions is limited to those who can show that the testator's intent *as expressed in the will* is frustrated by the negligence of the testator's attorney." *Babcock* at 1057 (emphasis in original) quoting *Espinosa* at 612 So2d at 1380.

The "four corners" rule was applied by the Iowa Court of Appeals in *Mills v Jordan, Mahoney & Jordan*, 2003 Iowa App LEXIS 765 (2003) (Addendum, ***Tab B***). The court rejected a legal malpractice claim that urged an overall intent to minimize estate taxes going beyond the provisions of a will and a marital trust. "Extrinsic evidence cannot be used to supply the intent element where the will does not." *Mills* at *8 quoting *Holsapple v McGrath*, 575 NW2d 518, 521 (Iowa, 1998). Any other rule for inferring intent "would be based on speculation and conjecture." *Mills* at * 11.

*Nobel v Bruce*, 349 Md 730; 709 A2d 1264 (1998) is similar to *Mills*. Maryland adheres to a privity rule when beneficiaries attempt to sue their decedent's estate planning attorney. *Noble* at 737-752. The panel applied a "traditional rule of strict privity," *id* at 752, but then turned to a discussion of whether a claim of negligent tax advice could somehow soften that rule. The panel would not permit it. The panel refused the invitation to consider extrinsic evidence that the attorney's "negligent estate planning advice resulted in the wills being drafted in a manner that created significant, avoidable estate tax liability contrary to [the decedents'] wishes." *Id* at 755. The panel explained that such lawsuits are "analogous to" "attacks on the will." *Id.* It reasoned:

> The assertion that the beneficiaries are not attacking the will or attempting to modify, vary, or interpret its terms is inaccurate. The suit against [the lawyer] may not involve a direct attack on the will, but it certainly is a collateral attack which, if successful, would result in the reformation of the will. Specifically, the will would be "rewritten" to manifest an intent of the testator to minimize the estate and inheritance taxes for the beneficiaries. *Noble*, 349 Md at 755.

See also, *Kirgan v Parks,* 478 A2d 713, 714 (Md, 1984) (whether a testamentary beneficiary can sue for negligent will drafting is a "definite maybe" that turns on the ability to do so without extrinsic evidence).

In accord with *Mieras* in disallowing use of extrinsic evidence: *Henkell v Winn*, 550 SE2d 577, 579 (S.C. 2001) (no extrinsic evidence in case against attorney involving will and estate plan); *Beauchamp v Kemmeter, Lathrop & Clark*, 240 Wis 2d 733, 742; 625 NW2d 297 (2000) (unnamed alleged beneficiaries of a will may not sue drafting attorney; reliance on extrinsic evidence would mean "the testators' intentions are at least as likely thwarted as not" and the case "presents a considerable risk that an attorney would be held liable, not for thwarting testator intentions but for properly carrying them out").

### *e. The majority opinion in the present case dishonors many cases in addition to Mieras.*

The lawyers in *Karam v Kliber*, 253 Mich App 410; 655 NW2d 614 (2002) drafted Abraham Karam Jr.'s will and a revocable trust, including amendments. Upon Karam's death, the estate plan evenly split his assets between a "family trust" and a "marital" trust. The plaintiffs were the beneficiaries, the trust (through its trustees) and the Estate (through its personal representative).

As in the present case, the plaintiffs collectively argued that the lawyer defendants gave "allegedly erroneous legal and tax advice" to the deceased, "which plaintiffs claim resulted in a large federal estate tax liability upon decedent's death." *Karam* at 411. Karam's Estate, his trust,

and his beneficiaries claimed that, instead of an "equalization" estate plan that split his trust assets equally between the marital and family trust, what Karam actually intended and should have been advised he needed was what the panel dubbed a "normal" estate plan. As the *Karam* panel explained: "In this so-called 'normal' scenario, no taxes are due upon the death of the first spouse and, although the assets left to the surviving spouse are subject to taxes upon the latter's death, the family trust can generate interest income to the surviving spouse or can grow tax free and be distributed to the remaining beneficiaries upon the latter's death." *Id* at 413.

In the present case, the plaintiffs argue that their decedents ought to have been convinced to use the tax-minimizing device of a Crummey Trust. In fact, plaintiffs allege that the defendants should have been annually nagged the Friedmans to grant Crummey withdrawal rights. In *Karam*, the issue "involve[d] the difference between the two ["normal" vs "equalized" plans], with plaintiffs arguing that while the decedent actually wanted a "normal" estate plan, the language of the trust documents created an "equalization" plan that caused the estate to be taxed upon the death of the decedent." *Id* at 414. The equalization language resulted in a markedly increased tax obligation:

> As a result of the trust language, decedent's assets were split almost evenly between the marital and family trusts, with a resulting federal estate tax of $1,676,494 and additional Michigan inheritance taxes in the amount of $417,115. *Id* at 416.

The *Karam* panel's core holding explained that even a beneficiary has no standing to sue, including for negligent tax advice, even when the intent expressed in the trust may not have been the deceased client's true intent:

> [P]laintiff Carole Karam has no standing to bring a malpractice claim against defendants, notwithstanding that the testator's intent expressed in the trust may not have been decedent's true intent. Because the decedent's intent *as expressed in the trust* is not ambiguous, the trial court did not err in granting summary disposition in favor of defendants with respect to Carole Karam's claim as an individual beneficiary. *Id* at 427 [emphasis in original].

All that matters is the intent discernible from the four corners of the estate planning documents.

*Bullis v Downes*, 240 Mich App 462, 469; 612 NW2d 435 (2000) applies *Mieras* and its "no extrinsic evidence" rule to an allegedly negligently drafted estate plan that consisted of a will, a revocable trust and the deeds drafted to transfer property into the trust. It stands as an example of the proper functioning of the rule in a case where, unlike *Mieras*, the beneficiaries were able to show frustration of the settlors' intent without resort to extrinsic evidence. In the deeds, the settlor transferred two pieces of real property to her trust. In her will, she specified that her daughter was to receive those same properties but all property of the trust was to be divided equally among her three children. Without resort to any extrinsic evidence, that is looking only to the four corners of the estate planning documents, the frustration of the testator's intent was easily discernable. Therefore, the attorney was not entitled to summary disposition.

*Bullis, supra* at 469 discussed the "great pains" the *Mieras* court took to establish the "no extrinsic evidence" rule. It explained that the rule disallows extrinsic evidence to prove an intent different from that expressed or to prove the intent was frustrated:

> [N]ot only is extrinsic evidence not to be used "to prove that the testator's intent is other than that set forth in the will," [*Mieras*] 452 Mich at 303, but it [*Mieras*] also implied that extrinsic evidence should not be used to establish that the testator's intent has been frustrated by the attorney's drafting of the will, 452 Mich at 303-304. *Bullis* at 469.

In *Bullis* the defendant attorney testified in Probate proceedings about the testator's intent to divide certain properties. Later, there were questions in the legal malpractice case about what constituted the estate planning documents and the attorney had made admissions on that point in the probate proceedings. The "four corners" rule was not violated in *Bullis* by allowing consideration of the attorney's testimony because his testimony went to the issue of what

constituted the "four corners." On that point, the lawyers' sworn testimony was clearly admissible.

*Bullis* does not stand for some general proposition, as the majority suggested in the present case, that summary disposition must be denied until the attorneys are deposed to find out if they "did or did not recommend such a [Crummey] provision, or that, if such was recommended, it was declined, or for what reasons" or the rest of the myriad of questions the majority posed. 261 Mich App at 652.

The earliest development of the "no extrinsic evidence" rule in this state is *Ginther v Zimmerman*, 195 Mich App 647; 491 NW2d 282 (1992). It still stands as good law. The trial court granted summary disposition in favor of the attorney who drafted a will that failed to convey certain real property to the plaintiffs. The *Zimmerman* panel stated the rule in a way entirely consistent with this Court's later formulation in *Mieras*:

> We believe that where the intent of the testator as expressed in the testamentary instrument is not frustrated, an attorney owes no duty that will give rise to a cause of action to persons not named in the instrument. *Ginther* at 655.

The application of *Mieras* to require beneficiaries to prove their cause of action without resort to extrinsic evidence is so well-settled that a number of Court of Appeals' decisions on point have been unpublished.

In *Linn v Youatt*, 1999 Mich App LEXIS 1649 (Addendum, ***Tab C***) summary disposition in favor of the law firm was affirmed. The deceased client's daughter claimed that the lawyer's legal advice to her father, taken as a whole, and the lawyer's drafting of a quitclaim deed of farm property to the father and "his children" was negligent. The daughter argued her father intended only she would receive the property after his death. The panel saw, in the wording of the quitclaim, that the father "did not want to relinquish control of the property" since he had deeded

it to himself as well as to his children. Citing *Mieras*, the *Linn* panel concluded that the defendant attorney "owed no duty to plaintiff."

In *Pauloweit v Martin*, 1998 Mich App LEXIS 1569 (Addendum, ***Tab D***), the plaintiff contended that she had been cut out of receiving benefits from one of her husband's life insurance policies because his attorneys failed "to either implement an estate plan consistent with [his expressed] wishes, or to instruct [him] on how to implement his own estate plan through beneficiary designations." This court affirmed summary disposition in the attorney's favor. Though the wife was named in the will and not in the life insurance beneficiary designation, "she cannot show that the intent expressed in [her husband's] will was frustrated."

In *Panek v Giarmarco*, 1997 Mich App LEXIS 2298 (Addendum, ***Tab E***) summary disposition in the attorney's favor was also affirmed. The lawyer drafted a trust agreement for plaintiff's mother. The plaintiff daughter argued that it was her mother's intent to leave the entire trust to her, but plaintiff's two nieces ended up also receiving part of its corpus. The panel examined the trust agreement and saw that: "The distribution arrangement was clear." One share went to plaintiff (the settlor's still-living daughter) and the other share went to plaintiff's nieces, the daughters of plaintiff's deceased sister. The clarity of the distribution was not disturbed by the fact that, at another point in the trust agreement, the plaintiff was named without reference to her deceased sister. The panel wrote: "[The mother's] intent, as expressed on the face of the agreement, was not frustrated."

In sum: until the Court of Appeals released the opinion in this case, the "no extrinsic evidence" rule meant exactly that.

### *f. Negligent advice claims do not provide an end run around Mieras and cases following it.*

The majority view in the Court of Appeals, that a negligent advice claim ought to permit this legal malpractice action to go forward in defiance of the four corners of the estate planning document, is belied by *Mieras* itself. The plaintiffs in *Mieras* alleged that the attorney had failed in his duties by not personally ascertaining from the testator, rather than from two of her children, whether the children's instructions accurately reflected their mother's intent. Such an allegation clearly implicated improper counseling of the client, but that did not rescue the claim from the effect of the "no extrinsic evidence" rule.

Consider, as well, the *Mieras* six-Justice majority treatment of *Heyer v Flaig*, 70 Cal 2d 223, 229, 74 Cal Rptr 225 (1969). The opinion specifically drew attention to the failure to advise claim in *Heyer*. While purportedly abiding by the "four corners" rule, the California court allowed a claim to go forward against lawyers who failed to "advise the testatrix that she should change her will after her marriage." *Mieras* at 305-306. This, according to the *Mieras* majority, is one of the cases that had improperly paid only lip service to the rule because it "improperly examined material outside" the documents.

The majority in the present case understood that in the published *Karam* case the plaintiffs had specifically claimed that the deceased client received negligent tax advice from his lawyers. 261 Mich App at 650, n5. The majority inaccurately wrote that the *Karam* panel "did not address this issue." *Id.* In fact, the *Karam* case reports that the plaintiffs argued that the lawyer defendants gave "allegedly erroneous legal and tax advice" to the deceased, "which plaintiffs claim resulted in a large federal estate tax liability upon decedent's death." 253 Mich App at 411. The *Karam* panel even listed one of plaintiff's arguments, as follows: that "(1) the bar against the use of extrinsic evidence in legal malpractice actions extends only to allegations of negligent drafting of a

will, not allegations of negligent advice or misrepresentations to clients." *Id* at 417. Despite these facts and argument reported in *Karam*, the majority in the Court of Appeals in the present case wrote that the claim "assumed that the matter was discussed with defendants." 261 Mich App at 650, n5. There is no such indication or assumption in the *Karam* opinion.

What the *Karam* panel held, and correctly so, is that a negligent tax advice claim against estate planning lawyers is a claim governed by the *Mieras* "no extrinsic evidence" rule. For the majority of the panel to have written that *Karam* does not answer the tax advice issue presented by this case is a position that cannot be responsibly maintained.

Similarly, in *Linn* the daughter's claim was defeated even though she cast it in terms of improper legal advice given to her father regarding the quitclaim deed. In *Pauloweit*, the claim failed even though the wife urged that her husband's lawyer should have instructed him on how to change his life insurance beneficiaries as part of implementing his estate planning.

And, as for the odd notion that a non-negligent attorney would have strong-armed his clients into accepting the aggressive form of tax avoidance that would best have advanced their beneficiaries' interests, there simply is no such duty. *Boranian v Clark*, 123 Cal App 4th 1012, 20 Cal Rptr 3d 405 (2004) explains it well, in the context of a beneficiary who disputed the deceased's testamentary capacity and whether his mother's lawyer should have protected her from being allegedly coerced into a deathbed bequest to her live-in companion.

> . . . [A] lawyer who is persuaded of his client's intent to dispose of her property in a certain manner, and who drafts the will accordingly, fulfills his duty of loyalty to his client and is not required to urge the testator to consider an alternative plan in order to forestall a claim by someone thereby excluded from the will (or included in the will but deprived of a specific assets bequeathed to someone else. 123 Cal App 4th at 1020.

Plaintiffs, for their part, have never offered any authority in support of their aberrant view of a lawyer's duty to dissuade a client from a path or annually remind them of their alternative choices.

*Persinger v Holst*, 248 Mich App 499; 639 NW2d 594 (2001) is the Michigan case that best captures the reason why defendants owed no duty to persuade the Friedmans to grant Crummey rights. In *Persinger*, the panel affirmed the trial court's grant of summary disposition in favor of the defendant attorney. The plaintiff alleged that the attorney's knowledge that the attorney-in-fact the client chose was "an illiterate, financial incompetent" gave rise to a duty to dissuade his client from choosing that particular agent. *Id* at 507. The Court of Appeals disagreed, explaining that there is no "authority that would impose the additional burden of insuring that . . . the principal [client] designated an appropriate agent." The panel concluded that to countenance such an "extraordinary duty," *id* at 509 "would impermissibly widen the scope of duty to infinite proportions." The panel said it must:

> . . . decline to posit the determination of an attorney's professional competence on the . . . alleged failure to dispense his subjective opinion regarding the principal's choice. *Id* at 508.

Defendants in the present case had no duty to insist that the decedents use a Crummey Trust or any other particular form of aggressive tax avoidance. There was also no duty to annually harass the Friedmans into deciding that their lawyers knew better than they what the Friedmans ought to do with their money.

### *g. This Court should reaffirm its commitment to the "no extrinsic evidence" rule and reverse the Court of Appeals.*

Less than a decade ago, every member of this Court agreed that the rule prohibiting non-clients from suing estate planning lawyers would be relaxed to permit beneficiaries to sue. *However*, a unanimous Court agreed that the beneficiaries would be permitted to go forward with

their case only if they could prove that their decedent's intent was frustrated by lawyer malpractice *without resort to evidence that was extrinsic to the will.* Six members of the *Mieras* Court, including Justice Cavanagh and Justice Weaver, joined Justice Boyle and decried Justice Levin's effort to qualify this "four corners" rule by reliance on a rationale that would have had courts deciding whether what was omitted from the estate plan was "commonly" omitted (or not). A rule that is riddled with exceptions will not do because probate and estate planning clients deserve better treatment.

Until the present case, the Court of Appeals steered a path consistent with the majority view of how the *Mieras* "four corners" rule works. The rule was applied to the full gamut of potentially challengeable estate planning documents, see *Bullis, supra* (trust and deeds) and *Karam, supra* (inter-related trusts).

The Court of Appeals majority opinion dramatically re-landscaped an entire area of litigation. It emaciated the *Mieras* "four corners" rule by relying on picky distinctions that do not make a difference. It rejected the analysis of the governing opinion in *Mieras* and instead flipped the *Mieras* vote and allowed Justice Levin's minority view to hold sway.

The Court of Appeals majority decided that applying *Mieras* as this Court wrote it would be "ignoring reality" and defying "common sense." 261 Mich App at 651. It found its sensibilities as "lawyers," "judges," and "men and women" offended by the "four corners" rule. *Id.* It decided it was "far more likely" than not that the Friedmans "intended to minimize taxes" and wrote it was "virtually certain" that the Friedmans "did not intend to pay more taxes than necessary." *Id.*

The majority decided the *Mieras* "four corners" rule is a bad rule. It decided that the rule is wrong-headed because it does not give enough freedom for beneficiaries to sue their

decedent's lawyer. *Id* at 653. The "safeguards" the majority hinted might be developed to supplant inequities under the exception it created were never articulated by the Court of Appeals majority. Plaintiffs have never articulated them.

This Court has already wrestled with these concerns. Although the *Mieras* "four corners" rule provides a defense for lawyers in cases like this one, that is not why it is needed. We need the rule to safeguard client rights. The rule protects lawyers' deceased clients from having their intents twisted once those clients have died and can no longer speak for themselves. *Mieras* exists to protect the estate planning lawyer's *client*.

The lawyer's duty to the beneficiaries, which this Court allowed to become actionable in *Mieras,* is a duty to assure that the decedent client's intent is respected. When lawyers are advising clients and drafting estate planning documents, their clients will not be well-served if the lawyers must *also* be looking over their shoulders and into the future to predict whether beneficiaries will be satisfied that tax-planning was sufficiently aggressive. If the *Sorkowitz* exception to *Mieras* "sticks," it will eclipse the rule. It will be a new day in the law offices of estate planning lawyers around the state. The duty owed to beneficiaries is a workable rule now because it is justly reined in by the "four corners" rule. Without the rule, beneficiary interests will actively compete for the lawyer's attention. Such competition will greatly disserve the client who walks into the lawyer's office to plan for one of the most personal legal decisions people make during their lifetimes--how what they have earned will be passed through to later generations.

## ARGUMENT II

**_Mieras_ and _Karam_ establish that the only parties who have standing to claim that the estate planning documents were improperly prepared, because tax liabilities were allegedly not sufficiently aggressively reduced, are the beneficiaries themselves. Only the beneficiaries can sue.**

Despite major concessions by the plaintiffs, both in the trial court and on appeal, the majority returned the cause of action to all the plaintiffs except apparently the trust (since the plaintiffs conceded it has no proper claim). The majority wrote that: "While the claims of the estate, trust and beneficiaries are clearly duplicative, the determination of the proper plaintiff or plaintiffs should be made after further discovery." 261 Mich App at 654. The majority never explained what possible light discovery can shed on issues of standing to sue.

The family of plaintiffs was completely cavalier in initially choosing who would sue. They reined in their enthusiasm for suit once the standing of the parties to sue was challenged in the trial court.

As to the Morris and Sarah Friedman Irrevocable Trust, plaintiffs admitted that it had no viable claim. In the trial court, plaintiffs wrote: "[P]laintiff admits that while as a trust [the irrevocable trust] it **could** be a party, it sustained no loss itself. Plaintiffs conceded [sic] that **this** trust is not a necessary party.[29] In the Court of Appeals, plaintiffs briefed that they believe "the principal offending document" is the Morris and Sarah Friedman Irrevocable Trust but that "plaintiff agreed" with the Defendants "that the Trust itself" was not a proper party."[30] Then plaintiffs moved on to considering if the Sarah Friedman Trust was a proper party.

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[29] Apx 21a, Plaintiffs' Response Brief Opposing Defendants' Motion for Summary Disposition (emphasis added).

[30] Apx 51a, Plaintiff's Court of Appeals Brief on Appeal, p 16.

The majority reversed the grant of summary disposition with respect to "the living trust." *Id* at 654.

In the Court of Appeals, the plaintiffs schizophrenically claimed that the Estate of Sarah Friedman was a proper party plaintiff by arguing that the Estate was "the post-death alter ego of Sarah Friedman."[31] The plaintiffs' brief in the Court of Appeals also contained unsettling musings that betrayed that there was no real issue on appeal about whether the Estate (or the Trusts) were proper plaintiffs. Plaintiffs accused that "several realities" had been ignored by this Court's examination of the standing question in *Mieras.* But their brief on appeal quickly acknowledged that: "Plaintiff's counsel has mixed feelings on this issue" and questioned about what "the plaintiff's tort bar" would "probably [be] better off with."[32]

The majority in the present case also reversed the grant of summary disposition with respect to the Sarah Friedman Estate. Its opinion acknowledged that "certain statements in *Mieras* might seem to indicate that the estate's cause of action is limited." 261 Mich App at 654, n6. *Mieras* plainly teaches that an estate's cause of action under these circumstances is *non-existent*, not that it is "limited."

The issue of who has standing to sue an attorney for negligently drafting a testator's will that dishonors the client /testator's intent, is considered in Part V of Justice Levin's lead opinion in *Mieras.* The remaining justices "agree[d]" with that portion of Justice Levin's opinion. *Mieras,* 452 Mich at 295. In explaining why the beneficiaries should be permitted to sue the testator's lawyers under certain circumstances, but not the Estate itself, the *Mieras* court explained that the Estate has not been harmed:

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[31] *Id.*
[32] Apx 53a.

> A decedent's estate as such has no interest in who obtains the money. The estate's interest, as an estate, is simply to collect the assets, to administer property, and to distribute according to the will. *Mieras*, Part V, 452 Mich at 290.

Justice Levin wrote that the "personal representative does not ordinarily have an interest in who obtains the money that is to be distributed." As expressed in *Heyer v Flaig*, 70 Cal 2d 223, 229, 74 Cal Rptr 225 (1969), quoted approvingly in *Mieras* at 290, "[O]nly the beneficiaries suffer the real loss:"

> Thus, if a lawyer who prepares a will erroneously is to be accountable for breach of the duty he owed his deceased client, the beneficiaries of the will must be able to maintain an action. *No one else has a sufficient interest, can show damage, or possesses the will, to do so.* *Mieras* at 290 [emphasis added].

Justice Boyle wrote for the remainder of the bench, expanding on Justice Levin's lack of standing analysis as to whether the Estate itself should be entitled to sue. She too relied on *Heyer v Flaig*, *supra* at 228, quoting more of the same passage relied on by Justice Levin:

> After death, a failure in [the testator's] testamentary scheme works no practical effect except to deprive his intended beneficiaries of the intended bequest. Indeed, the executor of an estate has no standing to bring an action for the amount of the bequest against an attorney who negligently prepared the estate plan, since in the normal case the estate is not injured by such negligence except to the extent of the fees paid; only the beneficiaries suffer the real loss.

Though *Mieras* arose in a will context, "given the realities of modern estate planning, with the proliferating use of alternative methods of estate disposition" *Mieras* applies "with equal force" even when the "instruments at issue are will substitutes," specifically, trusts. *Bullis*, *supra* at 468.

The principle that only the beneficiaries have standing to sue (provided they can do so without resort to extrinsic evidence) was also the holding in *Karam*, as Judge Fitzgerald writing in this case understood.

The *Karam* panel considered the question of whether the personal representatives could legitimately raise the decedents' *own* claim for legal malpractice by accessing the extrinsic evidence that was denied to the beneficiaries. The panel answered, "No." The panel quoted extensively from *Mieras* and ruled it provided additional grounds for summary disposition against the representative plaintiffs:

> [A]lthough *Mieras* was decided with respect to beneficiaries, *Mieras* also clearly provides strong and persuasive guidance with respect to personal representatives. *Karam* at 429.

This Court, in *Mieras*, as well as the panel in *Karam*, has clearly held that only the client's beneficiaries can potentially sue their decedent's estate planning lawyer. There is *no reason* and no justification for the majority to rule that: "The determination of the proper plaintiff or plaintiffs should be made after further discovery." 261 Mich App at 654. Everyone knows who everyone is. Obviously, deciding who can sue is the tail wagging the dog in this case. No one can sue. But the poor craftsmanship of the majority opinion is evident even on this point.

## RELIEF REQUESTED

Defendants Lakritz, Wissbrun & Associates, P.C., Gerald, Lakritz and Kenneth Wissbrun ask this Court to reverse the decision of the Court of Appeals and affirm the trial court's grant of summary disposition in defendants' favor.

**COLLINS, EINHORN, FARRELL & ULANOFF, P.C.**

By: Noreen L. Slank

NOREEN L. SLANK (P31964)
*Attorney for Defendants-Appellants*
4000 Town Center, Suite 909
Southfield, MI 48075
(248) 355-4141

Dated: July 27, 2005
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